STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v TERRENCE MITCHELL BRUCE, Defendant-Appellee. _____/	Supreme Court No. Court of Appeals No. 331232 Jackson Circuit Court No. 15-4688-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v STANLEY LYLE NICHOLSON, Defendant-Appellee. _____/	Supreme Court No. Court of Appeals No. 331233 Jackson Circuit Court No. 15-4688-FH

PEOPLE OF THE STATE OF MICHIGAN'S
APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCL 600.215(3) and MCR 7.303(B)(1). On October 5, 2017, the Michigan Court of Appeals issued a consolidated opinion vacating both defendant Bruce and defendant Nicholson's convictions for misconduct in office, MCL 750.505, on the basis that the trial court abused its discretion in denying their motions for a directed verdict. *People v Bruce*, unpublished opinion per curiam of the Court of Appeals, issued Oct 5, 2017 (Docket No. 331232); *People v Nicholson*, unpublished opinion per curiam of the Court of Appeals, issued Oct 5, 2017 (Docket No. 331233) (attached as Appendix A). The People seek leave to appeal the Court of Appeals' decision.

STATEMENT OF QUESTIONS PRESENTED

1. The definition of a "public officer" for purposes of Michigan's common-law crime prohibiting misconduct in office includes an individual whose position, under state law, is created by the legislature or an inferior body. When defendants converted an individual's property for their own personal use during the execution of a search warrant, they were federal border patrol agents acting pursuant to a Michigan statute enabling them to "enforce state law to the same extent as a state or local officer." Did the defendants occupy a position created by the Legislature?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

   Court of Appeals' dissent: Yes.

STATUTES INVOLVED

MCL 750.505 provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

MCL 764.15d provides, in pertinent part:

> (1) A federal law enforcement officer may enforce state law to the same extent as a state or local officer only if all of the following conditions are met:
>
> > (a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.
> >
> > (b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.
> >
> > (c) One or more of the following apply:
> >
> > * * *
> >
> > > (iii) The officer is participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency.
> > >
> > > (iv) The officer is acting pursuant to the request of a state or local law enforcement officer or agency.
> >
> > * * *
>
> (2) Except as otherwise provided in subsection (3), a federal law enforcement officer who meets the requirements of subsection (1) has the privileges and immunities of a peace officer of this state.

INTRODUCTION

Under long-settled Michigan common law, a "public officer" is an individual whose position is created by the Legislature. The common law does not determine whether an individual is a public officer by focusing on whether that individual has a particular title. Instead, it examines the substance of the position.

In the context of law enforcement, the Michigan Legislature gives certain individuals the same substantive authority that it gives to the State Police: the authority to "enforce state law to the same extent as a state or local officer," and to enjoy "the privileges and immunities of a peace officer of this state." MCL 764.15d. Here, the defendants, Bruce and Nicholson, were federal border patrol agents permanently embedded with a Michigan State Police task force comprised of state and federal law enforcement officers; because of their position in the task force, the defendants received authority under § 15d to enforce our State's laws.

They abused that authority: they converted private property for their own use while executing a search warrant. Accordingly, the Michigan Attorney General brought common-law misconduct-in-office charges against both defendants, and the jury found them guilty.

The Court of Appeals' majority, however, vacated the misconduct-in-office convictions on the theory that the defendants' position was not created by the Legislature. But the substance of their position—the authority to act as state law enforcement officers and the right to the privileges and immunities of that position—comes from § 15d, to which the majority paid only glancing attention.

In short, this situation falls comfortably within the existing common law regarding misconduct in office, because § 15d constitutes clear legislative authority that creates a public office. Because Bruce and Nicholson abused the authority they had by virtue of that office, this Court should reverse the lower court judgment and remand for further proceedings or, in the alternative, grant leave to appeal.

STATEMENT OF FACTS AND PROCEEDINGS

Defendants Bruce and Nicholson are border patrol agents embedded in a joint task force with state law enforcement officers.

The Hometown Security Team is a joint task force under the authority of the Michigan State Police (MSP), staffed by state and federal law enforcement agents. (9/21/15 Trial Tr [TT I] at 107, 110.) Two federal border patrol agents, defendants Bruce and Nicholson, were "permanently embedded" with the task force; in other words, "[t]hey didn't have other regular duty assignments. That was their job assignment." (TT I at 169; 9/22/15 Trial Tr [TT II] at 102, 103–104.) Another law enforcement team, the Jackson Narcotics Enforcement Team, also included state and local officers and worked in conjunction with the task force. (TT I at 126.)

The task force, Bruce and Nicholson included, and the narcotics team combined to execute a search warrant at a suspected drug property near Ann Arbor. (TT I at 110, 169, 220.) Michael Teachout, an MSP Trooper, created a tabulation, which accounts for every single item "of evidentiary value" seized by the police during execution of a search warrant. (TT I at 130, 136.) Seized items were loaded into the truck and trailer of the Jackson Narcotics Enforcement Team. (TT I at

132.) According to Teachout, other officers were "[a]bsolutely not" permitted to "make a decision to take property to the truck without making sure it's [in the] tabulation." (TT I at 132.)

Both Teachout and Assistant MSP Post Commander David Cook testified that taking any property from a residence for personal use, "even a quarter," is not permitted because it is against the law as well as the official orders of the MSP. (TT I at 137–138, 195, 198). No one had authority to take private property from a person's residence that was not being seized for forfeiture or evidentiary value. (TT I at 203.)

Defendants take items for their own personal use.

At trial, Nicholson testified that, while he was working with HST, he took and followed orders of MSP. (9/23/15 Trial Tr [TT III] at 26–27.) He stated that he considered himself a "peace officer" and explained his experience conducting search warrants in Detroit and as a police officer for the State of Maine. (TT III at 40, 42–43, 47–48.) He admitted that he knew that when executing a search warrant he should not "take anything from [a] house even though it's trash." (TT III at 49.)

Nonetheless, Nicholson, who said his role was to "perform external security" during execution of the search warrant (TT III at 29), admitted that he took an old thermometer from the property as a souvenir. (TT III at 31–37.) Nicholson confirmed that, after attempting to fix it up, he simply threw the thermometer in the garbage at home. (TT III at 37.) He also testified that, when an officer came to his house days later to investigate the taking, "[a]t that point I realized that it was

not a piece of trash [but] that it was somebody's property that had been removed from the home and I was responsible for it." (TT III at 39.) At trial, Nicholson's excuse was that an MSP trooper gave him the thermometer and told him that he should take it and fix it up, knowing that Nicholson was a "tinkerer of sorts." (TT III at 31.) This contradicted Nicholson's statement to Charles Christensen, the investigator in charge of this case. Nicholson told Christensen that "no officer ever told him he could take the property" and that no officer made any comments about taking "whatever you want illegally." (TT II at 171.)

About a week after execution of the search warrant, the task force's leader, MSP Sergeant Steven Temelko, received information that Nicholson's co-defendant Bruce had taken property from one of the locations during execution of the search warrant. (TT II at 111–112.) Sergeant Temelko asked Bruce about it, and Bruce "advised he did take a chair." (TT II at 112.) Bruce said that he did so out of "stupidity." (TT II at 113.)

The trial court denies the defendants' motion to dismiss the misconduct-in-office charges.

Before trial, Bruce and Nicholson filed a joint motion to dismiss the misconduct-in-office charges on the ground that they were not "public officers" subject to that crime. The trial court considered whether a federal border patrol agent acting in concert with state officers is a public officer. (9/11/15 Evid Hr'g at 11.) The court recognized that, pursuant to MCL 764.15d, federal officers can enforce state law to the same extent as state or local officers. (Hr'g at 11–12.) The

court found that the defendants here were participating in a joint investigation with state and local law enforcement and that the defendants "were acting under the color of the State Police powers that were there present as they were a joint venture at that point in time." (Hr'g at 12.) Because the defendants were essentially acting as part of MSP, they were public officers, and the Court denied the motion. (Hr'g at 12.)

For the same reasons, the Court subsequently denied the defendants' motions for directed verdicts that raised the same issue. (TT III at 20–21.)

The jury convicts.

The jury found Nicholson and Bruce guilty of misconduct-in-office; they were both acquitted of a separate charge of larceny in a building. (TT III at 123.) The court sentenced each defendant to 12 months' probation. (Sentencing Tr at 7.)

A split Michigan Court of Appeals panel determines that defendants are not public officers.

The Michigan Court of Appeals majority opinion concluded that Bruce and Nicholson were not public officers and were therefore exempt from the crime of misconduct-in-office. *Bruce*, majority op at 4. The panel quoted this Court's opinion in *People v Coutu*, 459 Mich 348 (1999), which set forth a number of elements to be examined to determine whether an individual as a public officer, the first of which states that the individual's position "must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature." *Bruce*, majority op at 4, quoting *Coutu*, 459 Mich at 354.

Focusing on the fact that the "the position of federal border patrol agent was not created by the Michigan Constitution or by the Legislature" or an inferior state authority, the majority held that the People had not established that the defendants satisfied the *Coutu* framework. *Id.* at 4. The panel majority limited its discussion of § 15d to a single sentence: "While MCL 764.15d allows federal law enforcement officers to enforce state law 'to the same extent as a state or local officer' if certain conditions are met, the fact that defendants were temporarily enforcing Michigan law bears no relation to how their positions were created." *Id.* at 4.

Because it held that the People had not established the first element required to prove that the defendants were public officers, the court vacated the misconduct-in-office convictions and declined to consider the remaining *Coutu* factors or the defendant's other claims. *Id.* at 4.

The Court of Appeals dissent would have concluded, under *Coutu*, that the defendant are public officers.

Judge Borello, in dissent, would have affirmed the defendants' convictions. He would have concluded that at the time of the charged offense, defendants were in positions that were created by the state legislature through § 15d. The statute "confer[ed] state authority upon" the defendants, who were operating as part of the MSP-led task force. *Id.* at 4. The position that defendants held, and were employed at the time, were as task force members at the time; § 15d created defendants' positions. *Id.* Judge Borello relied on the legislative determination that federal officers can act as state law enforcement officers under certain circumstances:

> In this case, MCL 764.15d permits "federal law enforcement officer[s] [to] enforce state law to the same extent as a state or local officer." Thus, the Legislature crafted a law that permits federal law enforcement officers to act under the color of state law to the same extent as state or local officers under certain circumstances such as part of a joint federal-state investigation. See MCL 764.15d(1)(c)(iii)-(iv). Hence at the time of the offenses, defendants were operating not as border patrol agents but as part of a joint task force. The only way defendants could participate in the joint task force was by state statute, MCL 764.15d. The majority fails to address the impact that MCL 764.15d has on whether the federal officers, at the time the offense was committed, were acting in law enforcement positions—i.e. [Hometown Security Team] members—that were created by the Legislature pursuant to the statutory authorization under MCL 764.15d. [*Bruce*, dissenting op at 4.]

Disagreeing with the majority on the first element, the dissent examined the rest of the *Coutu* elements, finding that each of them were satisfied, and would have held that Bruce and Nicholson were public officers subject to the crime of misconduct in office. *Bruce*, dissenting op at 4–5.

STANDARD OF REVIEW

Whether a defendant is a public officer is a question of law reviewed de novo. *People v Coutu*, 459 Mich 348, 353 (1999).

On appeal, Bruce and Nicholson challenged the trial court's decision not to grant their motion for a directed verdict and pretrial motion to dismiss, respectively. A trial court's decision on a motion to dismiss is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26 (2012). An abuse of discretion occurs when the circuit court's decision falls outside the range of principled outcomes. *People v Jones*, 497 Mich 155, 161 (2014).

ARGUMENT

I. Federal law enforcement officers enforcing state law under MCL 764.15d are public officers under Michigan's common-law crime of misconduct-in-office.

This case of first impression presents the question whether this State's common-law crime of misconduct in office encompasses federal officers acting under the authorization of state law, even though they lack a formal title. Because this Court has eschewed the sacrifice of substance for form when determining who is a public officer, holding that this crime does encompass the defendants would merely be reiterating that long-established principle. But even if it were a small expansion of the common-law test, it is an expansion this Court should make.

Given the interconnectedness of law enforcement on the local, state, and federal levels (especially in light of the challenges of terrorism, immigration enforcement, and the interstate drug trade), law enforcement officers are, more than ever, compiled in joint task forces. And law enforcement officers serving on the joint task forces and enforcing Michigan law should be subject to the same standard of conduct, no matter who signs their paychecks. Given the public's interest in holding accountable those who are charged with enforcing its laws and the significance of the issue in today's law enforcement landscape, this Court should grant the application or reverse the Court of Appeals judgment and remand to consider the full question whether these defendants were public officers. MCR 7.305(B)(3).

A. Law enforcement officials have consistently been considered public officers subject to the crime of misconduct in office.

The sole issue before this Court is whether the Legislature created a position as a public officer for federal agents when it permitted them to enforce state law to the same extent as state and local officers. The statute making misconduct in office a crime leaves its definition to the common law. MCL 750.505 ("Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court."). Accordingly, the groundwork for much of the analysis is already set forth in precedent. Under the common law, misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Perkins*, 468 Mich 448, 456 (2003), quoting *People v Coutu,* 459 Mich 348, 354 (1999). The crime of misconduct-in-office applies to relatively few—only those stationed to act in the public trust. The universe of individuals subject to this common-law crime is limited to "public officers," also called "public officials." *Coutu*, 459 Mich at 358 n 12 (there is "no distinction between the terms 'public officer' and 'public official' ").

"Public officer" describes a wide range of individuals. See, e.g., *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 585 (1997) ("[P]ublic school academy board members are public officials and are subject to all applicable law pertaining to public officials."); *Dosker v Andrus*, 342 Mich 548,

552 (1955) (deputy register of deeds is a public official). This Court has long recognized a broad definition of "public office," stating that the "correct rule" focuses on the functions performed by the official:

> A public office is the right, authority and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer. [*People v Freedland*, 308 Mich 449, 455 (1944), quoting Meechem on Public Offices and Officers §§ 1 and 2.]

In *Freedland*, this Court defined "public office" *not* as a formal position with a title, but as "the right, authority and duty" conferred by law. It emphasized the "individual" and what the legislature entrusted that individual to do. A public officer is not a position category determined by human resources; it is a delegation of authority and duty by the Legislature. 63 Am Jur 2d Public Officers and Employees § 42 ("The creation of an office need not necessarily be declared in express words. Any language which shows legislative intent to create the office is sufficient."); see also, e.g., *Ryan v Riley*, 223 P 1027 (Cal App 1924) ("Upon first impression it might appear questionable as to whether any such office was in fact created, but upon further consideration and investigation it seems clear that the language used conveys the intent as well as embodies the intent of the legislature to call into existence such an office notwithstanding the fact that the functions of that office are to be gathered only from the general terms of the section, to wit, to enforce the provisions of the Motor Vehicle Act . . . .").

In recent years, this Court centered on elements to be considered when evaluating whether the position an individual holds is a public office:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;
>
> (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;
>
> (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority;
>
> (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body;
>
> (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Coutu*, 459 Mich at 354–355 (citation omitted).]

A sixth element, which is "also of assistance in determining whether a position is a public office," is the existence of an oath or bond requirement. *Id.* at 355.

This Court has consistently recognized law enforcement officers as public officers in the context of the crime of misconduct in office, see *Coutu*, 459 Mich at 356 (deputy sheriff), as well as for purposes of tort immunity, *Tzatzken v Detroit*, 226 Mich 603, 608 (1924), and charges of willful neglect, *People v Medlyn*, 215 Mich App 338, 341 (1996). In cases "addressing the relationship between law enforcement personnel *and the discharge of their duties*, courts have *consistently* concluded they are public officials." *Coutu*, 459 Mich at 357–358 (emphasis added; collecting cases). The inquiry whether a law enforcement official is a public officer depends on the "context" in which the question is asked. *Coutu*, 459 Mich at 357; see also *Freedland*, 308 Mich at 457 ("Manifestly, however, each case should be decided on its peculiar facts, and *involves necessarily a consideration of the*

legislative intent in framing the particular statute by which the position, whatever it may be, is created.") (emphasis added). Indeed, when this Court considered the meaning of "State officer" in our constitution, it was "equally clear that the term 'State officer' will vary in content with its use and context, and that the same officeholder may be an officer of the State for one purpose and not for another." *Coutu*, 459 Mich at 357 n 11, quoting *Schobert v Inter-Co. Drainage Bd*, 342 Mich 270, 281–282 (1955).

In this contextual inquiry, federal agents acting as state law enforcement officers pursuant to plain legislative authority occupy positions created by the Legislature.

B. By operation of statute, federal agents acting as state law enforcement officers are "public officers."

Bruce and Nicholson were not acting as federal border patrol agents when they were executing a search warrant under Michigan law; they were acting, pursuant to § 15d, as state law enforcement officers.

The Supreme Court has said, "the creation of offices . . . is a legislative function." *Cochnower v United States*, 248 US 405, 407, *mod* 249 US 588 (1919). Michigan law agrees. This Court has said that an office subject to the crime of misconduct in office "must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature." *Coutu*, 459 Mich at 354.

The applicable statutory authority comes from MCL 764.15d, which provides, in pertinent part:

> (1) *A federal law enforcement officer may enforce state law to the same extent as a state or local officer* only if all of the following conditions are met:
>
> > (a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.
> >
> > (b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.
> >
> > (c) One or more of the following apply:
> >
> > > (i) The officer possesses a state warrant for the arrest of the person for the commission of a felony.
> > >
> > > (ii) The officer has received positive information from an authoritative source, in writing or by telegraph, telephone, teletype, radio, computer, or other means, that another federal law enforcement officer or a peace officer possesses a state warrant for the arrest of the person for the commission of a felony.
> > >
> > > (iii) The officer is *participating in a joint investigation* conducted by a federal agency and a state or local law enforcement agency.
> > >
> > > (iv) The officer is *acting pursuant to the request of a state or local law enforcement officer or agency*.
> > >
> > > (v) The officer is responding to an emergency.
>
> (2) Except as otherwise provided in subsection (3), a *federal law enforcement officer who meets the requirements of subsection (1) has the privileges and immunities of a peace officer of this state*. [Emphasis added.]

First things first: Bruce and Nicholson do not dispute on appeal that they were acting pursuant to this statute when assisting in execution of the search

warrant. And Bruce and Nicholson also meet the requirements of § 15d(1)(c)(*iii*) (because they were "participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency") and § 15d(1)(c)(*iv*) (because they were "acting pursuant to the request of a state or local law enforcement officer or agency").

The question, then, becomes whether a federal agent acting as a state law enforcement agent under § 15d should be immune from the charge of misconduct in office for conduct arising from the performance of that individual's duties as a state or local officer. A "consideration of the legislative intent in framing the particular statute," *Freedland*, 308 Mich at 457, leads to the conclusion that the Legislature created a "public office" for federal officers acting pursuant to § 15d. When Bruce and Nicholson wore the hat of state law enforcement officers as part of the task force, they were state law enforcement officers. They had, pursuant to statute, the authority, the privileges, and the immunities of a state law enforcement officer. MCL 764.15d(1) & (2). These characteristics were recognized by *Freedland* as the core of what makes an individual a public officer: "the right[s], authorit[ies] and dut[ies] conferred by law." 308 Mich at 455. These officers were also, through § 15d, "individual[s] invested with some portion of the sovereign functions of the government," *Freedland*, 308 Mich at 455; they were entrusted with "enforc[ing] state law to the same extent as a state or local officer." MCL 764.15d(1).

To exclude these individuals from the ambit of the misconduct-in-office crime would be to immunize certain officers "enforc[ing] state law to the same extent as a

state or local officer" from this important check on the abuse of public office. That the Legislature did not affix a particular title to this position is of no moment. Such a formalistic requirement would rob *Freedland* and its progeny of its command that each inquiry rests on the context and the Legislature's intent. *Coutu*, 459 Mich at 357 (recognizing that "context" matters for this precise question); *Freedland*, 308 Mich at 457 ("Manifestly, however, each case should be decided on its peculiar facts, and *involves necessarily a consideration of the legislative intent in framing the particular statute* by which the position, whatever it may be, is created.") (emphasis added). See also *People v Jackson*, 487 Mich 783, 800 (2010) (cautioning against unnecessarily "elevating form over substance").

Nicholson's argument in the Court of Appeals rested heavily on MCL 15.181(e), which defines "public officer" in an entirely different context. That provision—an entry in the definitions section of the incompatible public offices act, MCL 15.181 *et seq*—has textually limited applicability. By its plain terms, the statutory definitions apply to instance of the term "public officer" "as used in this act." MCL 15.181. What's more, the crime of misconduct in office is a common-law offense; it is not part of the act for which the Legislature promulgated that definition of "public officer." Indeed, the Legislature's purpose for that act is distinct from the common-law crime of misconduct in office, rendering the scope of the statutory definition inapposite. *Oakland Co Prosecutor v Scott*, 237 Mich App 419, 423 (1999) ("The purpose of the [incompatible public offices act] is to preclude any suggestion that a public official is acting out of self-interest or for hidden

motives . . . ."). Finally, using a statutory term from an entirely different statute effectuating an entirely different purpose would ignore the common-law's understanding that such phrases "will vary in content with its use and context." See *Coutu*, 459 Mich at 357 n 11 (quotation marks omitted).

An individual who "may enforce state law to the same extent as a state or local officer" and who "has the privileges and immunities of a peace officer of this state" holds a public office and should similarly bear its burdens. To hold otherwise would effectively immunize certain members of an MSP-led joint task force from the applicable criminal law because their paychecks come from another source.

C. The common law supports incremental changes when justified, especially where the Legislature has expressed its intent.

A finding that federal officers acting under § 15d are acting in a position created by state law fits comfortably within this Court's precedent. But to the extent an incremental change in the law is necessary, it is warranted. Unlike the statutes of this State, enacted by the Legislature and static by their plain language, the common law represents "the accumulated expressions of the various judicial tribunals." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242 (2013). The common law "develops incrementally," over time and through experience, and "gradually evolve[es]" through adjudication of individual disputes. *Id.* at 243. Mindful of its power to alter the law with the votes of a majority of justices, this Court has recognized the importance of making any changes to the common law in an incremental manner. See *id.* at 243 n 1.

But while this Court has the authority to modify the common law as it sees fit, it need worry about a lack of legislative direction here. Indeed, the intent of the Legislature in granting the authority is a "necessary" consideration when determining whether an individual should be considered a public officer. *Freedland*, 308 Mich at 457 ("Manifestly, however, each case should be decided on its peculiar facts, and *involves necessarily a consideration of the legislative intent in framing the particular statute* by which the position, whatever it may be, is created.") (emphasis added). The plain language of § 15d makes clear the intent—to permit federal agents to enforce state law consistent with the limits of state officers. That intent is also reflected in the statute's legislative history. Senate Legislative Analysis, SB 155, February 11, 1999 attached as Appendix B (expanding the authority of federal officers to enforce state law under MCL 764.15d in recognition that "[federal officers'] role now may be limited due to Michigan's [then-]narrow statutory authorization for them to enforce State law.").

In addition to the statutory indications that these federal agents should be treated the same as their state and local counterparts when acting pursuant to § 15d, the integrated nature of law enforcement today provides a strong basis to treat them consistently. Law enforcement task forces that combine resources and personnel from local, state, and federal authorities are more and more common. See Rachel A. Harmon, *Federal Programs And The Real Costs Of Policing*, 90 N.Y.U. L. Rev. 870, 888–891 (2015) (enumerating the several federal efforts, through funding or otherwise, to establish multijurisdictional task forces to tackle various

sorts of criminality involving narcotics, gang violence, firearms, human trafficking, and border security and trafficking). In our own state, the Michigan State Police recognize at least twenty-two regional narcotics task forces that "are staffed by a combination of state, county, local, and federal law enforcement officers."[1] The proliferation of these task forces is the raison d'etre of § 15d. See Senate Legislative Analysis, SB 155, February 11, 1999 attached as Appendix B (noting "increased number of task forces established by the Federal government that combine the efforts of Federal, state, and local law enforcement agencies"); cf. *Jackson v Estate of Green*, 484 Mich 209, 230 (2009) ("Not only is this interpretation consistent with the plain language of the statute, it is also consistent with the legislative history of the statute.").

The increase in multijurisdictional task forces, and the removal of distinctions between who is a "state officer" and who is a "federal officer" under § 15d, demands treating all of the officers alike and holding them to the same standards. Demarcating who is subject to the criminal law for official misconduct based purely on the formality of the individual's title unnecessarily elevates form over substance and creates perverse incentives for federal agents to flaunt the expectations of the very state which authorizes them to act at all.

[1] See Michigan State Police, Special Investigation Division, *available at* http://www.michigan.gov/msp/0,4643,7-123-72297_41992---,00.html; Michigan State Police, Narcotics Task Forces, *available at* http://www.michigan.gov/msp/0,4643,7-123-72297_41992-148869--,00.html.

D. Even if this Court decides that federal law enforcement officers enforcing state law do not fall within the first prong of *Coutu*'s rubric, the *Coutu* elements need not all be fully satisfied.

While *Coutu* refers to a list of "indispensable elements," textual evidence in *Coutu* itself suggests that the elements outlined in that opinion should be treated merely as factors to consider. *Coutu*, 459 Mich at 354. The Court of Appeals majority held that, because the first element of the *Coutu* elements was not established, that was the end of the inquiry. *Bruce*, majority op at 4. But textual clues in this Court's analysis suggest that the indispensable nature of the elements is that each must be considered, but not necessarily fulfilled.

The Court held that "[e]xamination of these elements *support[] the conclusion* that a deputy sheriff is a public official . . . ." *Id.* This language suggests that the Court did not create a bright-line rule that *only* individuals who satisfy every single element are considered public officials, but that the elements are factors that must be considered. If the elements took the form of necessary boxes to check, surely consideration of the elements would not merely *support* the conclusion that a deputy sheriff is a public official—such a conclusion would be *required*. The Court of Appeals' analysis improperly zeroed in on the first element of the *Coutu* framework and in so doing again repeated its mistake of ignoring context—here, the context in the *Coutu* opinion and in this Court's precedent. See *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 60–61 (2014) (in the context of statutory interpretation, the Court warned against reading a provision with "a magnifying glass to the exclusion of its relevant context").

Moreover, the Court stated that oath and bond requirements "are also of assistance" in the determination. *Coutu*, 459 Mich at 355. The Court's use of the phrase "also of assistance" suggests that the six "indispensable elements" were each intended to *assist* in the determination of whether a person is a public officer, not that all of the elements must be present. Describing the requirement of a bond or an oath to be "also of assistance" either renders the remainder of the elements as mere factors to consider or else makes that bond or oath requirement superfluous.

Because the Court of Appeals majority narrowly focused on the first prong of the *Coutu* test, in the event that this Court reverses, it should remand to the Court of Appeals for further evaluation of those factors. Should the court grant the application, the remainder of the *Coutu* elements are satisfied for the reasons stated in the Court of Appeals' dissenting opinion. *Bruce*, dissenting op at 4–5.

CONCLUSION AND RELIEF REQUESTED

Bruce and Nicholson converted private property for their own personal use. As law enforcement officers charged with enforcing state law, their convictions of misconduct-in-office should stand.

The People respectfully request this Court reverse the Court of Appeals' judgment and remand to consider the remainder of the issues presented or, in the alternative, grant leave to appeal.

Respectfully submitted,

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